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No. 85-1370

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ARKANSAS WRITERS' PROJECT, INC.,
Appellant,

v.

RAGLAND, COMMISSIONER OF REVENUE,
Appellee.

On Appeal from the Supreme Court of Arkansas

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF TIME INC. IN SUPPORT OF APPELLANT

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF TIME INC. IN SUPPORT OF APPELLANT

Time Inc. ("Time") respectfully moves for leave to file the attached brief *amicus curiae*. The consent of counsel for appellant to the filing of this brief has been obtained. The consent of counsel for appellee was requested but refused.

Time is the largest publisher of general circulation magazines in the United States. It publishes and distributes Time Magazine, Fortune, Sports Illustrated, People, Money, Life, and Discover. Time Magazine alone has a domestic circulation of 4.6 million. In addition, a subsidiary of Time, Southern Progress Corporation, publishes Southern Living and Southern Accents. Time frequently participates as *amicus curiae* before this Court in cases raising important issues under the First Amendment. *See, e.g., Anderson* v. *Liberty Lobby*, 54 U.S.L.W. 4755 (U.S. June 25, 1986); *City of Los Angeles* v. *Preferred Communications, Inc.*, 106 S. Ct. 2034 (1986).

Time's publications are sold in Arkansas as well as the rest of the United States and abroad. When sold by individual retailers in Arkansas, the magazines are subject to the gross receipts tax on sales at issue in this appeal. The question presented is whether an Arkansas statute exempting newspapers and certain magazines from the gross receipts tax on sales, while taxing other magazines, violates the First Amendment. Time has a direct interest in the resolution of that question. In addition, the disposition of the present appeal will affect practices in other States concerning special or selective taxation of periodicals, in a manner that would directly affect the operations of Time throughout the United States.

The statute at issue in this appeal distinguishes between publications for purposes of taxation on the basis of content, type of publication, and whether the publication is printed and published in Arkansas or outside the State. It is not clear that appellant, publisher of a magazine printed and published within the State, will raise all of the arguments contesting the validity of the statute, including those that are significant with respect to publications from outside the State. Time accordingly submits that its participation as *amicus* may help ensure that the Court is presented with a full exposition of the issues raised in this appeal, and the effect that resolution of the appeal will have not only on publishers in Arkansas but on those like Time, with operations throughout the United States.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF *AMICUS CURIAE*	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. The Arkansas Selective Exemption Scheme Is An Invalid Content-Based Restriction on Freedom of the Press	6
II. The Arkansas Selective Exemption Scheme Violates the First Amendment by Impermissibly Distinguishing Among Members of the Media	14
CONCLUSION	21

TABLE OF AUTHORITIES

Cases	Page
Arizona Publishing Co. v. *O'Neil*, 22 F. Supp. 117 (D. Ariz.), *aff'd mem.*, 304 U.S. 543 (1938)	19
Armco Inc. v. *Hardesty*, 467 U.S. 638 (1984)	13, 17
Associated Press v. *NLRB*, 301 U.S. 103 (1937)	12
Bolger v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983)	7
Buckley v. *Valeo*, 424 U.S. 1 (1976)	18
Carey v. *Brown*, 447 U.S. 455 (1980)	8-9
City Council of Los Angeles v. *Taxpayers for Vincent*, 466 U.S. 789 (1984)	9-10
City of Alameda v. *Premier Communications Network, Inc.*, 156 Cal. App. 3d 148, 202 Cal. Rptr. 684, *cert. denied*, 105 S. Ct. 567 (1984)	17
City of Renton v. *Playtime Theatres, Inc.*, 106 S. Ct. 925 (1986)	10
Consolidated Edison Co. v. *Public Service Comm'n*, 447 U.S. 530 (1980)	7, 8, 9
Cox v. *Louisiana*, 379 U.S. 536 (1965)	9
FCC v. *League of Women Voters*, 468 U.S. 364 (1984)	6, 9
First National Bank v. *Bellotti*, 435 U.S. 765 (1978)	18
Giragi v. *Moore*, 49 Ariz. 74, 64 P.2d 819, *appeal dismissed*, 301 U.S. 670 (1937)	19
Greer v. *Spock*, 424 U.S. 828 (1976)	7
Grosjean v. *American Press Co.*, 297 U.S. 233 (1936)	6, 13, 19
Heffron v. *International Society for Krishna Consciousness*, 452 U.S. 640 (1981)	18-19
Larson v. *Valente*, 456 U.S. 228 (1982)	7, 20
Lehman v. *City of Shaker Heights*, 418 U.S. 298 (1974)	7
Metromedia, Inc. v. *City of San Diego*, 453 U.S. 490 (1981)	9
Minneapolis Star & Tribune Co. v. *Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983)	*passim*
National Bellas Hess, Inc. v. *Department of Revenue*, 386 U.S. 753 (1967)	13
Orr v. *Orr*, 440 U.S. 268 (1979)	14

TABLE OF AUTHORITIES—Continued

	Page
Perry Education Ass'n v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983)	7, 20
Police Department of Chicago v. *Mosley*, 408 U.S. 92 (1972)	6, 9
Railway Express Agency, Inc. v. *New York*, 336 U.S. 106 (1949)	20
Regan v. *Taxation With Representation*, 461 U.S. 540 (1983)	11
Regan v. *Time Inc.*, 468 U.S. 641 (1984)	6
Rostker v. *Goldberg*, 453 U.S. 57 (1981)	13
Saia v. *New York*, 334 U.S. 558 (1948)	19
Schneider v. *State*, 308 U.S. 147 (1939)	19
Speiser v. *Randall*, 357 U.S. 513 (1958)	6, 14
Tampa Times Co. v. *City of Tampa*, 158 Fla. 589, 29 So.2d 368, *appeal dismissed*, 332 U.S. 749 (1947)	19
Time Inc. v. *Hulman*, 34 Ill.2d 344, 201 N.E.2d 374 (1964)	15
United States v. *Lee*, 455 U.S. 252 (1982)	20
Virginia Pharmacy Board v. *Virginia Consumer Council*, 425 U.S. 748 (1976)	11
Widmar v. *Vincent*, 454 U.S. 263 (1981)	7
Young v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976)	10

Constitutional Provisions and Statutes

U.S. Const. art. I, § 8	17
U.S. Const. Amend. I	*passim*
Ark. Stat. Ann. § 84-1903	2
Ark. Stat. Ann. § 84-1904	2, 14, 16, 17

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BRIEF *AMICUS CURIAE* OF TIME INC. IN SUPPORT OF APPELLANT

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Time Inc. ("Time") is the largest publisher of general circulation magazines in the United States. It publishes and distributes Time Magazine, Fortune, Sports Illustrated, People, Money, Life, and Discover. Time Magazine alone has a domestic circulation of 4.6 million. In addition, a subsidiary of Time, Southern Progress Corporation, publishes Southern Living and Southern Accents.

By its terms, the Arkansas gross receipts tax at issue in this appeal covers sales of these publications by individual retailers in Arkansas. Appellant challenges the constitutionality of the Arkansas tax on the ground that

the discriminatory application of the tax to some magazines, while newspapers and certain other magazines are exempt, violates the First Amendment. Resolution of this question will have a direct effect on nonsubscription sales of the magazines published by Time, since they are subject to the challenged tax. The Court's disposition of this appeal will also affect the practices in other States with respect to special or selective taxation of media, and directly affect the operations of *amicus* throughout the United States.

STATEMENT OF THE CASE

Arkansas exempts some members of the press but not others from its gross receipts tax on sales. In selecting which members of the media are entitled to an exemption from the tax, Arkansas law looks to the content of the publication, the nature of the publication, and whether it is printed and published within Arkansas or outside the State.

Ark. Stat. Ann. § 84-1903 imposes a three percent tax on gross receipts derived from sales. Section 84-1904 exempts from this tax a lengthy list of products, from unprocessed crude oil to gate admission fees to rodeos. Included among these exemptions is an exemption for "[g]ross receipts or gross proceeds derived from the sale of newspapers," *id.* § 84-1904(f), and an exemption for "religious, professional, trade and sports journals and/or publications printed and published within this State, * * * when sold through regular subscriptions." *Id.* § 84-1904(j).[1]

Appellant Arkansas Writers' Project, Inc., publishes *Arkansas Times Magazine*, a general interest monthly magazine. *Arkansas Times* is printed and published in Arkansas, and is sold through regular subscriptions.

[1] Subsection 84-1904(j) also provides an exemption for "[g]ross proceeds derived from sales of advertising space in newspapers and publications and billboard advertising services."

Since it is not a religious, professional, trade, or sports journal or publication, however, and since it is not considered a newspaper, *Arkansas Times* is compelled to pay the gross receipts tax.

After this Court's decision in *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), *Arkansas Times* filed a claim before the Arkansas Commissioner of Revenue for a refund of the gross receipts taxes it had paid since October 1982. *Arkansas Times* claimed that if the "magazine exemption" were not construed to cover it, the selective taxation of *Arkansas Times*, while newspapers and other magazines were exempt, would violate the First and Fourteenth Amendments to the United States Constitution. App. to J.S. 12-13. The claim for a refund was denied, and *Arkansas Times*, having exhausted its administrative remedies, proceeded to state court. The Chancery Court of Pulaski County held that *Arkansas Times* was entitled to an exemption as a matter of statutory interpretation, *id.* 14-18, but the Arkansas Supreme Court reversed on appeal, holding that to qualify for an exemption a magazine not only must be printed and published in Arkansas and sold through subscriptions, but must also be "a religious, professional, trade, or sports periodical." *Id.* 10.

In a supplementary opinion on rehearing, the Arkansas Supreme Court considered the constitutionality of the selective tax exemption under the First and Fourteenth Amendments, an issue that had previously been argued by *Arkansas Times* and which the court recognized "should have been discussed" in its original opinion. *Id.* 11. The court rejected the claim of discriminatory treatment, reasoning that *Arkansas Times* could not object to exemptions granted to others:

> [I]t would avail [*Arkansas Times*] nothing if it wins its argument. * * * It is immaterial that an exemption in favor of some other taxpayer may be

> invalid, as discriminatory. If so, it is the exemption that would fall, not the tax against the *Times*. The courts cannot create a tax exemption; that must be done by the legislature. It has not exempted the *Times*. [*Id.*]

The court also rejected the argument that the selective tax on the *Arkansas Times* violated the First Amendment and this Court's decision in *Minneapolis Star*, *supra*. The Arkansas Supreme Court stated that this Court

> said that the owners of newspapers are not immune from any of the "ordinary forms of taxation" for support of the government. That statement applies with even greater force to the *Times*, a monthly magazine publishing matters of general interest. [App. to J.S. 12.]

Arkansas Times appealed to this Court, presenting the question whether a state tax imposed on *Arkansas Times* from which newspapers and certain other magazines were exempt violated the First Amendment. J.S. 1.

SUMMARY OF ARGUMENT

Arkansas law looks to the content of magazines to determine whether to tax them. Such content-based discrimination among otherwise indistinguishable publications is a clear burden on speech protected by the First Amendment, and can survive only if the State can demonstrate that the discrimination is necessary to achieve a compelling state interest. The State's interest in raising revenue is certainly important, but that interest in no way explains the selective exemption of some magazines from the tax on the basis of content. It is not the tax itself but the discriminatory application of the tax on the basis of the content of publications that offends the First Amendment.

Quite apart from this content-based discrimination, the Arkansas statute also violates the First Amendment be-

cause it imposes the tax on some segments of the media but not others. Just as Arkansas may not favor speech on some subjects as opposed to others in the application of its tax code, so too it may not favor some speakers over others. Newspapers and magazines are entitled to the same protection under the First Amendment, yet Arkansas arbitrarily favors speech by newspapers by granting them a tax exemption not enjoyed by other publications. Arkansas also discriminates in favor of local speech and against ideas from outside its borders, by granting an exemption from its tax to certain magazines only if they are printed and published in Arkansas.

Neither the court below nor the State in its Motion to Dismiss even attempted to justify the State's effort to "pick and choose" among members of the media in applying its tax. Both the Arkansas Supreme Court and the State avoid the issues in this case by asserting that the *Arkansas Times* cannot complain about a generally applicable tax and cannot object to exemptions granted to others. With respect to the media, however, the tax is clearly not generally applicable, and the *Arkansas Times* —like any claimant alleging that a statute is underinclusive—clearly has standing to object to discriminatory exemptions. Arkansas has offered no justification for its selective taxation of the media, and such a power in the State to tax some publications but not others on the basis of content or type of publication cannot withstand scrutiny under the First Amendment.

ARGUMENT

I. The Arkansas Selective Exemption Scheme Is An Invalid Content-Based Restriction on Freedom of the Press

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972). *See Regan* v. *Time Inc.*, 468 U.S. 641, 648-649 (1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment"). Arkansas violates this bedrock principle of First Amendment jurisprudence by taxing some magazines and exempting others solely on the basis of the content of the magazines. It is well-established that a discriminatory tax imposed on speech or the press is a restriction on First Amendment freedoms. As this Court noted in *Speiser* v. *Randall*, 357 U.S. 513, 518 (1958), "[i]t cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech." *See Grosjean v. American Press Co.*, 297 U.S. 233, 244-245 (1936) (discriminatory tax on the press analyzed as a "restraint" on the press).

If the articles in the *Arkansas Times* were devoted to religion or sports, the magazine would be exempt from the gross receipts tax. Since the articles deal with other subjects, the magazine must pay the tax. Arkansas "enforcement authorities must necessarily examine the content of the message that is conveyed" to determine whether an Arkansas publisher is to be taxed. *FCC* v. *League of Women Voters*, 468 U.S. 364, 383 (1984). Such official scrutiny of the contents of publications as the basis for imposing a tax strikes at the very heart of the First Amendment.

In any case involving content-based restrictions on First Amendment freedoms, the State "must show that its regulation is necessary to serve a compelling state

interest and that it is narrowly drawn to achieve that end." *Widmar* v. *Vincent*, 454 U.S. 263, 270 (1981). *See Minneapolis Star*, 460 U.S. at 582; *Larson* v. *Valente*, 456 U.S. 228, 246-247 (1982). The State faces a heavy burden in attempting to justify a content-based regulation, and the exacting test is rarely met. As the Court noted in *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 65 (1983), "[w]ith respect to noncommercial speech, this Court has sustained content-based restrictions only in the most extraordinary circumstances." [2]

Arkansas' scheme of selectively taxing and exempting particular members of the media on the basis of the content of their publications is not spared strict scrutiny simply because Arkansas does not discriminate on the basis of the particular views expressed in any journal.[3]

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[2] None of the examples cited in *Bolger* of permissible content-based restrictions—libel, obscenity, and "fighting words"—is pertinent in this case. The discrimination against the *Arkansas Times* is not based on any objectionable characteristic of the speech in the magazine, but solely on the fact that it is not limited to the favored topics of religion, sports, or professional and trade issues.

[3] The Court has applied less exacting scrutiny to subject matter restrictions in the limited context of cases involving nonpublic forums. *See, e.g., Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Greer* v. *Spock*, 424 U.S. 828 (1976); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974). As the Court noted in *Perry*, "[i]mplicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity." 460 U.S. at 49. This reasoning has, however, been strictly limited to cases involving claims of access to nonpublic forums. In applying more relaxed scrutiny in *Perry*, the Court was careful to distinguish cases that "do not concern access to government property," and noted that in one such case "the Court expressly distinguished our public forum cases, stating that 'the special interests of a government in overseeing the use of its property' was not implicated." 460 U.S. at 50-51 (quoting *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530, 540 (1980). Those special interests are similarly not implicated in the present case, and accordingly the Arkansas tax scheme should be tested under the strict scrutiny generally applied to content-based restrictions.

Such an argument was raised and definitively rejected in *Consolidated Edison Co.* v. *Public Service Comm'n, supra.* In that case the Court considered a Commission ban on utility company bill inserts discussing nuclear power. The Commission argued that the ban was

> acceptable because it applies to all discussion of nuclear power, whether pro or con, in bill inserts. The prohibition, the Commission contends, is related to subject matter rather than to the views of a particular speaker. Because the regulation does not favor either side of a political controversy, the Commission asserts that it does not unconstitutionally suppress freedom of speech. [*Id.* at 537.]

The Court, however, struck down the ban, noting that the "First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Id.* The Court emphasized that to "allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." *Id.* at 538. The same consequence would inevitably flow from allowing the government to tax discussion of some subjects while exempting others.

The principle that a State may not discriminate against protected speech on the basis of its content—even if the State remains neutral with respect to particular viewpoints—has been repeatedly reaffirmed by this Court. In *Carey* v. *Brown*, 447 U.S. 455 (1980)—decided the same day as *Consolidated Edison*—the Court held that a state statute prohibiting picketing of dwellings and residences, but exempting from its prohibition labor picketing, violated the First Amendment. The Court noted that "it is the content of the speech that determines whether it is within or without the statute's blunt prohibition," *id.* at 462, and stated that "[i]t is, of course, no answer to assert that the Illinois statute does not discriminate

on the basis of the speaker's viewpoint, but only on the basis of the subject matter of his message." *Id.* at 462 n.6. *Accord, Police Department of Chicago* v. *Mosley*, 408 U.S. at 95-96; *Cox* v. *Louisiana*, 379 U.S. 536, 581 (1965) (Black, J., concurring).

In *FCC* v. *League of Women Voters, supra*, the Court held that a ban on editorializing by publicly subsidized, noncommercial television and radio stations violated the First Amendment. The Court analyzed the restriction as a ban "defined solely on the basis of the content of the suppressed speech," rejecting the argument that the restriction should be upheld because it was "neutral" in the sense that Congress was not favoring one editorial viewpoint over any other. 468 U.S. at 383-384. In *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490 (1981), the Court struck down a municipal ban on outdoor advertising displays, in part because of exceptions to the ban based on the content of certain outdoor signs.[4] As the plurality noted, "[w]ith respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse." *Id.* at 515. The plurality specifically rejected the argument that the ban and exemptions did not violate the First Amendment because they were "neutral" and do "not favor one side over another on a subject of public controversy." *Id.* at 518. That argument, the plurality noted,[5] had been clearly rejected in *Consolidated Edison. Id.* at 518-519.[6]

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[4] One of the exceptions—for signs carrying or displaying religious symbols—is particularly pertinent in light of the exemption in the Arkansas tax scheme for magazines devoted to religious subjects. *See* 453 U.S. at 514 (plurality opinion).

[5] Justices Brennan and Blackmun concurred in the judgment on the ground that the ban constituted a total ban on a medium of communication. 453 U.S. at 525-526. It was accordingly not necessary for them to consider the present question.

[6] *See also City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789 (1984), in which the Court upheld a ban on the

The Arkansas statute discriminates on its face against protected, noncommercial speech solely because of the content of the speech. As the foregoing cases clearly establish, it is wholly irrelevant that the statute does not distinguish among publications on the basis of the views expressed. Arkansas cannot favor speech on selected topics, by taxing speech on other topics, unless it can demonstrate that such a distinction is necessary to achieve a compelling state interest.

Nothing in *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976), or *City of Renton* v. *Playtime Theatres, Inc.*, 106 S.Ct. 925 (1986), is to the contrary. In both cases the Court upheld zoning restrictions on adult theaters. The restrictions were imposed not on the basis of the content of the films but solely on the basis of the secondary effects of such theaters on the surrounding community. *See Young*, 427 U.S. at 71 n.34 (plurality opinion), *id.* at 82 n.6 (Powell, J., concurring in the judgment); *Renton*, 106 S.Ct. at 925-930. Arkansas has, of course, pointed to no peculiar or unique "secondary effects" of general interest magazines as opposed to sports or trade magazines that would justify differential treatment of them in a manner that burdens First Amendment rights. Even if any such "secondary effects" could have been shown, it is far from clear that they could justify the patent content-based discrimination in the Arkansas statute.

Nor is the Arkansas scheme spared strict scrutiny because the State grants a tax exemption to other mem-

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posting of signs on utility poles. The Court rejected the argument that the ban was overbroad and could have been drafted to permit posting of political posters, noting that "[t]o create an exception for * * * political speech and not * * * other types of speech might create a risk of engaging in constitutionally forbidden content discrimination." *Id.* at 816.

bers of the media that potentially might publish discussion of the same topics featured in the *Arkansas Times*. The State cannot contend that it is innocent of content-based discrimination among the media simply because it exempts one medium, newspapers, from the gross receipts tax regardless of the content of the subjects discussed in that medium. *See Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U.S. 748, 757 n.15 (1976) ("We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means"). *See also Regan* v. *Taxation With Representation*, 461 U.S. 540, 553 (1983) (Blackmun, J., concurring) ("It hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him"). The fact that Arkansas does not discriminate on the basis of the content of newspaper speech cannot alter the fact that it does discriminate in determining the tax exempt status of certain magazines printed and published in Arkansas.

The applicability of the strict scrutiny test is further supported by this Court's recent decision in *Minneapolis Star*, *supra*. In that case the Court struck down on First Amendment grounds a Minnesota use tax imposed on the cost of paper and ink products consumed in the production of a publication. The Court concluded that a "tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest." 460 U.S. at 582.

The State has articulated no interest—compelling or otherwise—to support its content-based approach to taxation of the media. It is neither apparent nor explained why Arkansas must tax general interest magazines while exempting, for example, sports magazines and trade journals. The only interest the State has advanced has

been the general interest in raising revenue. Such an interest might justify taxation of the press generally, along with other business, but that is not the question before the Court. The State's admittedly important interest in raising revenue in no way explains its decision to tax some but not other publications, solely on the basis of content. The Court in *Minneapolis Star* recognized that the interest in raising revenue

> is critical to any government. Standing alone, however, it cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally, avoiding the censorial threat implicit in a tax that singles out the press. [460 U.S. at 586 (footnote omitted).]

Arkansas has not avoided First Amendment concerns by taxing businesses generally, or by exempting the media generally. Quite the contrary, Arkansas has decided to pick and choose among members of the media. If the interest in raising revenue cannot justify "special treatment of the press," it surely cannot justify special treatment of some members of the press, and Arkansas cannot claim to have avoided the "censorial threat implicit in a tax that singles out the press" by singling out only certain members of the press.

The court below misconceived the central issue in this case when it dismissed appellant's First Amendment argument with the cursory statement that the *Arkansas Times* was not immune from ordinary taxation for support of the government. App. to J.S. 12. This Court has stated that the publisher of a newspaper "must pay equitable and nondiscriminatory taxes on his business," *Associated Press* v. *NLRB*, 301 U.S. 103, 133 (1937) (dictum), that "[i]t is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support

of the government," *Grosjean* v. *American Press Co.*, 297 U.S. at 250 (dictum), and most recently that "our cases have consistently recognized that nondiscriminatory taxes on the receipts or income of newspapers would be permissible," *Minneapolis Star*, 460 U.S. at 587 n.9 (dictum). A nondiscriminatory tax on the press, however, is simply not at issue in this case.[7] It is precisely and only the *discrimination* in the gross receipts tax to which the *Arkansas Times* objects.

The court below dismissed appellant's discrimination argument—a critical aspect of its First Amendment claim—on the curious ground that "[i]t is immaterial that an exemption in favor of some other taxpayer may be invalid, as discriminatory. If so, it is the exemption that would fall, not the tax against the *Times*." App. to J.S. 11. The State also pressed this argument in its Motion to Dismiss, at 5. This position—which would essentially preclude adjudication of any claim that a statute is underinclusive—is clearly contrary to logic and long-established law.

This Court has often, in a wide variety of contexts, considered claims of discrimination based on the assertion that others similarly situated were exempt from the operation of a law adversely affecting the claimant. *See, e.g.*, *Armco Inc.* v. *Hardesty*, 467 U.S. 638 (1984) (successful Commerce Clause challenge brought by out-of-state manufacturer on the ground that in-state manufacturers were exempt from state gross receipts tax), *Rostker* v. *Goldberg*, 453 U.S. 57 (1981) (unsuccessful equal protection challenge brought by males on the ground that females were exempt from draft registration law). In any such case in which it agrees with the claim, the Court simply holds the discriminatory scheme invalid.

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[7] If such a tax is permissible under the First Amendment, other constitutional limitations may nonetheless preclude its imposition in certain circumstances. *Cf. National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753 (1967).

It is true that the legislature can cure the discrimination either by making the exemption generally applicable or by eliminating the exemption, but a court cannot presume to know which option the legislature will choose. *See generally Orr* v. *Orr*, 440 U.S. 268, 272 (1979). In this case a favorable ruling would mean simply that Arkansas cannot impose its tax on the *Arkansas Times* while exempting other members of the media.[8]

Arkansas has presented no compelling reason for taxing some publications and exempting others, solely on the basis of the content of their speech. "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech." *Speiser* v. *Randall*, 357 U.S. at 518. That is precisely the effect of the challenged statute.

II. The Arkansas Selective Exemption Scheme Violates the First Amendment by Impermissibly Distinguishing Among Members of the Media

The Arkansas tax scheme violates the First Amendment by drawing arbitrary distinctions not only between different members of the same medium, but also between different media. The objectionable distinctions are not limited to those based on content, discussed above, but also include a distinction between newspapers and magazines, regardless of content. Newspapers are exempt from the gross receipts tax, Ark. Stat. Ann. § 84-1904 (f); magazines, unless they fall within the limited magazine exemption, *id.* § 84-1904(j), are not.

In *Minneapolis Star*, *supra*, this Court began its analysis by noting that the tax was "facially discriminatory" because "Minnesota has singled out the press for special treatment." 460 U.S. at 581-582. The tax at issue in

[8] The error of the court below is all the more remarkable in light of the fact that this Court in *Minneapolis Star* struck down the tax at issue in that case in large part because of an exemption from the tax available to small publishers. *See* 460 U.S. at 591-592.

this case is as "facially discriminatory" as the tax struck down in *Minneapolis Star*, and even more objectionable, since the discrimination is among members of the media rather than simply against the media as a whole. The Court in *Minneapolis Star* struck down the Minnesota ink and paper tax "not only because it singles out the press, but also because it targets a small group of newspapers." *Id.* at 591. Minnesota granted an exemption from its ink and paper tax for the first $100,000 of ink and paper consumed, which had the effect of imposing the tax on only a limited segment of the media—large publishers. *Id.* at 591 & n.15.[9] Here the selective application of the Arkansas gross receipts tax is even starker. Arkansas law does not contain a facially neutral exemption that has the indirect effect of imposing the tax on only a discrete segment of the media; on the contrary, Arkansas explicitly provides that its tax shall be imposed on some members of the media but not others.

The Court in *Minneapolis Star* went so far as to suggest that *no* state interest could be compelling enough to justify such differential treatment among members of the press: "[w]hatever the motive of the legislature in this case, we think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme." 460 U.S. at 591-592.

[9] The Court in *Minneapolis Star* had no occasion to address differential treatment of newspapers and magazines, as opposed to differential treatment based on the size of publication, since the Minnesota ink and paper tax applied to both newspapers and magazines. *See* 460 U.S. at 597 n.* (Rehnquist, J., dissenting). *Cf. Time Inc.* v. *Hulman*, 34 Ill.2d 344, 201 N.E.2d 374, 378 (1964) (construing state tax exemption for newspapers to apply to magazines as well because "[a]fter a full and careful consideration of the classes of newspapers and magazines disseminating news and information, we are of the opinion that there is no real or substantial difference between newspapers and plaintiffs' magazines").

See also id. at 593 (White, J., concurring on ground that exemption invalidates Minnesota tax). As the Court concluded, "[a] tax that singles out the press, *or* that targets individual publications within the press, places a heavy burden on the State to justify its action." 460 U.S. at 592-593 (emphasis supplied).

The State attempts to dismiss the significance of *Minneapolis Star* by arguing that "[a]ppellant has not been subject to a special tax as was at issue in *Minnesota Star* [sic] * * *." Motion to Dismiss 4. This argument misses the mark. As noted, the holding in *Minneapolis Star* was based on two independent and adequate grounds. The Minnesota tax on ink and paper used in publication was invalid because it was a special tax on the press and, quite apart from this concern, because the tax applied to some members of the press but not others. *See* 460 U.S. at 591, 592. In any event, while the Arkansas tax is applicable to many businesses in addition to the press, with respect to the press the exemptions—particularly the exemption for all newspapers—swallow the rule. The Arkansas tax, as applied to the media, is simply not a generally applicable tax. Arkansas has not availed itself of the option specified in *Minneapolis Star* of "taxing businesses generally." 460 U.S. at 586.[10]

The concerns expressed by the Court in *Minneapolis Star* over differential taxation of the press apply *a fortiori* to differential taxation among members of the press. "A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected." 460 U.S. at 585. That statement was made in the context of taxing the press differently than business as a whole. It applies with

[10] Indeed, in light of the large number of exemptions from the tax for other businesses and products, *see* Ark. Stat. Ann. § 84-1904, it would be inaccurate to describe the tax as a generally applicable tax, quite apart from the exemptions for selected members of the media.

even greater force to a power to tax some members of the media while exempting others. The concern in *Minneapolis Star* was that the State could threaten to impose burdensome taxes on the press as a whole, and "[t]hat threat can operate as effectively as a censor to check critical comment by the press." *Id.* Here Arkansas is claiming the far more insidious power to grant or withhold tax exemptions from specific segments of the media.[11] It would be a strange doctrine that held that a State may not impose differential taxes on the press, for fear of censorial effects, but was free to pick and choose which members of the media are subject to an otherwise generally applicable tax.[12]

[11] Other lower courts have recognized the teaching of *Minneapolis Star* that differentiation among the media raises particularly acute concerns under the First Amendment. In *City of Alameda* v. *Premier Communications Network, Inc.*, 156 Cal. App. 3d 148, 202 Cal. Rptr. 684, *cert. denied*, 105 S. Ct. 567 (1984), for example, the court struck down a municipal gross receipts license tax applicable to television subscription services, relying on *Minneapolis Star*. The court ruled that the city's interest in raising revenue "cannot, standing alone, justify special treatment of a segment of the media * * * when alternative means of achieving the same interest without implicating First Amendment concerns are available." 156 Cal. App. 3d at 156, 202 Cal. Rptr. at 689.

[12] The Arkansas tax also discriminates among the media on the basis of whether the publication is printed and published within Arkansas or outside the State. The exemption for religious, professional, trade, or sports magazines is only available to such magazines printed and published in Arkansas. Ark. Stat. Ann. § 84-1904(j). Although the issue has not been raised in this case, it is notable that this provision is clearly unconstitutional as a violation of the Commerce Clause, U.S. Const. art. I, § 8. In *Armco Inc.* v. *Hardesty, supra*, this Court held that a gross receipts tax on wholesaling from which local manufacturers were exempt violated the Commerce Clause. The present case, involving a gross receipts tax on sales from which certain local publishers are exempt, is indistinguishable from *Armco*. Quite apart from Commerce Clause concerns, a tax on the media that is levied on out-of-state publications but not on similar local publications raises serious First Amendment concerns. A State may not favor local views by imposing a tax on ideas from outside its borders.

Arkansas cannot defend its decision to impose a selective tax on magazines on the ground that it is merely according favorable treatment to newspapers. As this Court noted in *Buckley* v. *Valeo*, 424 U.S. 1, 48-49 (1976), "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."

In *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978), the Court struck down on First Amendment grounds a state statute restricting corporate expenditures to influence the vote on public referendum issues. The Court declined to permit the State to restrict speech solely on the basis of the identity or form of the speaker, whether an individual, association, or corporation. "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *Id.* at 784-785. In Arkansas, magazines may, of course, address public issues, but they pay a price for doing so that newspapers do not. Acceptance by this Court of a power in the State to impose taxes on selected segments of the media would be tantamount to acceptance of a power in the State "to channel the expression of views" that *Bellotti* held was incompatible with the First Amendment. *Id.* at 785. In a State, for example, where newspapers generally supported the political party in power but magazines did not, the power to tax only magazines would be an awesome one.[13]

[13] The distinction in the challenged statute between newspapers and magazines, and between "religious, professional, trade and sports" magazines and other magazines, requires Arkansas officials to review publications and make the often highly subjective determination as to what constitutes a "newspaper" as opposed to a "magazine," or whether a particular magazine qualifies as a religious, professional, trade or sports magazine. This Court has often recognized the danger that such subjective judgments pose to

Discrimination among the press, and not simply differentiation of the press, was an important characteristic of the taxes at issue in the two leading cases in which this Court invalidated taxes on the press. In *Grosjean* v. *American Press Co.*, 297 U.S. at 244-245, the Court struck down a license tax on the sale of advertising imposed only on those newspapers with a weekly circulation above 20,000. As this Court recognized in *Minneapolis Star*, the tax in *Grosjean* applied only to "a *selected group* of newspapers." 460 U.S. at 580 (emphasis supplied).[14] And the exemption for certain newspapers from the ink and paper tax at issue in *Minneapolis Star* was, as noted, an independent basis for invalidating that tax. 460 U.S. at 591-592. By contrast, the three cases in which this Court has summarily rejected challenges to taxes on the press all involved taxes that did not discriminate among the media.[15]

First Amendment freedoms. *See, e.g., Heffron* v. *International Society for Krishna Consciousness*, 452 U.S. 640, 649 (1981); *Schneider* v. *State*, 308 U.S. 147, 163-164 (1939); *Saia* v. *New York*, 334 U.S. 558 (1948). The problem is illustrated by *amicus'* publication Time Magazine, which regularly includes sections on religion and sports but which would probably not be considered by state officials to qualify as a religious or sports magazine.

[14] The Court in *Minneapolis Star* noted that the case before it could not be disposed of by "simple citation to *Grosjean*," since in *Minneapolis Star* there was no indication, "apart from the structure of the tax itself," of any impermissible motive on the part of the legislature. 460 U.S. at 580. There is similarly no extraneous evidence of legislative intent in this case, but, as *Minneapolis Star* makes clear and as noted above, the burden is on the State to justify a discriminatory tax of the sort at issue here. It is not necessary to establish illicit legislative motive to find a violation of the First Amendment, particularly when the tax has the effect of penalizing a "selected group" within the media. *See id.* at 592-593.

[15] *Arizona Publishing Co.* v. *O'Neil*, 22 F. Supp. 117, 118 (D. Ariz.), *aff'd mem.*, 304 U.S. 543 (1938); *Giragi* v. *Moore*, 49 Ariz. 74, 79, 64 P.2d 819, 821, *appeal dismissed*, 301 U.S. 670 (1937); *Tampa Times Co.* v. *City of Tampa*, 158 Fla. 589, 594, 29 So.2d 368, 370, *appeal dismissed*, 332 U.S. 749 (1947).

In its First Amendment decisions this Court has frequently recognized the wisdom of Justice Jackson's statement that "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 112 (1949) (concurring opinion). *See, e.g., Minneapolis Star*, 460 U.S. at 585; *Larson* v. *Valente*, 456 U.S. at 245. The notion that the State abridges freedom of speech when it treats similarly situated speakers differently is basic to the First Amendment.[16] Such selective taxation of the media "places a heavy burden on the State to justify its action." *Minneapolis Star*, 460 U.S. at 592-593. The State has failed to articulate any reason —let alone a compelling reason—for this differential taxation, and, in any event, the "potential for abuse" inherent in such taxation is such "that no interest suggested by [the State] can justify the scheme." *Id.* at 592.

"When speakers and subjects are similarly situated, the State may not pick and choose." *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. at 55. In applying its sales tax to certain members of the media, Arkansas picks and chooses both among speakers and among subjects. Arkansas taxes some magazines but exempts all newspapers, discriminating among speakers. It taxes out-of-state magazines but exempts some local magazines, again discriminating among speakers. And it taxes some magazines but exempts others solely because of content, discriminating among subjects. In purporting to "pick and choose" among members of the media, Arkansas has violated the First Amendment.

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[16] A comparable situation exists with respect to the religion clauses of the First Amendment. Government may impose restrictions that are applicable to all religions, *United States* v. *Lee*, 455 U.S. 252 (1982), but may not draw distinctions among different denominations. *Larson* v. *Valente, supra.*

CONCLUSION

For the foregoing reasons, and those in the Brief of Appellant, this Court should reverse the decision below.

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